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No. 79-1420
IN THE

Supreme Court of the United States

October Term, 1979

In re:
Multi-Piece Rim Products Liability Litigation.

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY TO UNITED STATES GOVERNMENT BRIEF AMICUS CURIAE.

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Introduction.

The Department of Justice has filed a Brief for the United States as Amicus Curiae (hereafter "Government Brief"). While generally supportive of the position of Respondent Risjord,[1] the Government Brief not only raises additional

[1]In accordance with prior practice, we shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs".

arguments but also espouses positions at variance with those urged by Risjord. Accordingly, Firestone is replying separately to the Government Brief.

Before addressing the principal arguments advanced by the Government, a few preliminary observations are in order.

First of all, the Government Brief makes certain concessions which tend to support arguments urged by Firestone. Thus the Government acknowledges that in applying the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court has not adopted the narrow touchstone (*i.e.*, of important questions of law) espoused by Risjord. The Government also recognizes the narrow scope of mandamus, which precludes its use as an effective substitute for appeal in disqualification cases.

Secondly, the Government repeatedly seeks to apply what is in practical effect a double standard. In essence, the Government seeks to fashion a rule which would permit the Goverment to obtain immediate appellate relief from orders denying its attempts to disqualify counsel, while conveniently closing that avenue to certain private litigants, presumably including some who might seek to challenge present or former Government counsel. The role which the Government thus adopts, while understandable in terms of its own self-interest, hardly can be characterized as a neutral one, let alone one clothed with the public interest.

Third, the Government goes further and assumes a role which is difficult to understand in terms of an *amicus curiae* (even one guided by its own self-interest). In effect, the Government purports to address the merits of the specific case at hand in a fashion which does not appear relevant to any apparent governmental interest. In effect, the Government, without really coming to grips with the underlying

issues, urges that the trial court's order denying disqualification ought not to be reversed.

Finally, it is interesting to note that as recently as January 26, 1980, the Government, appearing as amicus curiae in another case, expressed the following views, in broad language which appears to contradict its position here:

> "The government agrees with this Court's decision in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (*en banc* decision), that an order denying a disqualification motion is appealable. Such a ruling is collateral to the main action within the meaninig of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Moreover, such an Order could not be effectively reviewed on appeal of the underlying action." Brief of the United States as Amicus Curiae in *Armstrong v. McAlpin*, __ F.2d __ (2d Cir. No. 79-7042, June, 1980), page 9, note 4.

I.

THE GOVERNMENT'S CHALLENGE TO APPEALABILITY IS NOT WELL TAKEN.

The Government does not urge that disqualification orders generally should be non-appealable but contends that the denial of disqualification here in question fails to pass muster in this regard. That contention is grounded on the Government's view that no irreparable injury would be sustained if appellate review were deferred until after judgment on the merits.[2] In order to point up the basic fallacy in that

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[2]The Government also suggests that the disqualification proceeding here may be tied to the merits of the case and hence is not really "collateral". That suggestion is manifestly unsound. Of course, any order may conceivably have some bearing on the handling of the case by counsel and in that sense be said potentially to affect the outcome on the merits. But that obviously is not the sense in which the collateral nature of an order is to be tested under *Cohen*. For example, an order setting excessive bail would affect the defendant's ability to aid counsel in preparation of the case, yet such orders are appealable under the *Cohen* doctrine. See *Stack v. Boyle*, 342 U.S. 1 (1951). Indeed, even the question whether security for costs need be posted (the very issue

(footnote continued on following page)

argument,[3] it is necessary to focus on the nature of the injury posed by Risjord's role.

Because Risjord's actions (including his tactical and strategic choices) must inevitably be colored by his awareness of their impact upon his firm's longstanding client Home (whose efforts to avoid coverage are premised on Risjord's intentional tort theory), the very presence of Risjord inevitably taints the proceedings. In essence, there is injected into the case a contaminating element — the interest of Home in avoiding coverage — which tends to deflect the progress of the case from the course it would follow if pursued by counsel freed of Risjord's differing interests. That very fact is irreparably injurious to the interests of Firestone, to the interests of the Risjord plaintiffs, and to the public interest, all of which require that the case be pursued free of any such contaminants.

It is not a valid answer to these concerns to suggest that one cannot predict in advance precisely what effect the contamination will have on the outcome of the case or that Firestone might prevail in spite of or even because of that contamination. Neither Firestone nor the Risjord Plaintiffs may be compelled to take such a gamble, and even if they were so inclined (which Firestone emphatically is not) the public interest forbids it.[4] Moreover, the very difficulty of measuring the impact of the contamination on the end result,

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in *Cohen*) might be said to affect the outcome in this sense — *e.g.*, if a party failed to post security as directed, and was foreclosed from pursuing his case. What the *Cohen* test really addresses in this regard is whether the order in question determines "claims of right separable from, and collateral to, rights asserted in the action . . ." (*Cohen*, 337 U.S. at 546).

[3]Since the Government's arguments here are to some extent intertwined with its challenge to Firestone's standing, what is said in the latter context at Point II of this Brief applies here as well. The present discussion likewise bears on the argument at Point II below.

[4]In order to put the issue in clearer focus, assume that Home's General Counsel undertook to represent the Risjord Plaintiffs, and pursued theories in light of which Home purported to disclaim coverage. Could

and resulting difficulty in fashioning any meaningful post-judgment relief, argues persuasively for immediate appellate review. These difficulties are compounded by the fact that we deal here not merely with the victory or defeat of the parties *inter se* but also with the question of insurance coverage. Thus the "gamble" must be viewed not only in terms of the effect of Risjord's presence on the victory or defeat of the respective parties but also in terms of its effect on the prospects that any recovery (even if rendered more remote overall) would more likely be so fashioned as to enhance Home's prospects of defeating coverage. Even assuming Firestone prevails, the Risjord-Home factor may operate to its prejudice by requiring it to assume the burden of defending claims which but for the Risjord-Home factor might not have been pursued, or at the very least might have been jettisoned at an earlier stage. Certainly one can readily comprehend Firestone's refusal to be put "at risk" in this fashion or to be required to defend under these circumstances.

Nor can we fathom the Government's professed inability to comprehend the difficulty of ascertaining at the post-judgment phase precisely how the taint of the Risjord-Home relationship may have affected the myriad tactical and strategic judgments Risjord eventually must confront. It is unlikely that even Risjord himself could measure that influence.

Therefore, while we do not subscribe to the Government's proposed selective approach to appealability (see *United States v. MacDonald*, 435 U.S. 850, 857, note 6 (1978)), even if such an approach were adopted, the present case

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it seriously be contended that the consent of Home and the Risjord Plaintiffs would obviate the taint inherent in such a course or that to sanction such a practice would not irreparably sully the administration of justice?

would be a particularly deserving candidate for review.[5] Indeed, the arguments urged by the Government in favor of appealability in other contexts (*e.g.*, the difficulty of proving prejudice, and the impairment to the judicial process which cannot be redressed even if the party seeking disqualification ultimately prevails) generally apply here also, notwithstanding the Government's assertion to the contrary.

II.

THE GOVERNMENT'S CHALLENGE TO FIRESTONE'S STANDING IS NOT WELL TAKEN.

Much of the Government's Brief is devoted to challenging Firestone's standing to seek Risjord's disqualification. In essence, the Government urges that there is no important public interest at stake nor a sufficient private interest in that Firestone itself has not been a client of Risjord. Actually, neither of the Government's premises is sound.

The motion for disqualification does seek to vindicate an important public interest, as reflected in the authorities (including cases in the Federal courts involving *both* civil and criminal litigation) deriving standing from the duty of an attorney to bring such matters to the court's attention. See Petitioner's Reply Brief, pp. 12-13.

But it is unnecessary to ground Firestone's standing on the public interest factor alone, for the conflict of which Firestone complains does raise concerns personal to it. Firestone's own legal interests are at stake here, and Firestone is threatened with injury "peculiar to itself." It does not

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[5]The Government Brief states (p. 21, note 18) that the present case lacks an "objective factor" assuring the good faith of the appeal. While the Government's proposed test of "objectivity" is unclear, it seems difficult to conceive of a more objective factor than the relationship undisputably here present: i.e., the fact that plaintiffs' counsel is linked to defendant's insurer and is asserting a theory upon which the insurer purports to disclaim coverage.

seek only to prevent injury to the public. And while the authorities cited at page 13 of Petitioner's Reply Brief indicate that Firestone would have standing even if not directly affected, the fact that it is directly affected obviously strengthens its position in this regard. In short, the Government's premise that Firestone is acting merely as a private attorney general is erroneous.

Here it is essential to note that we are dealing with a situation involving at least *three* private interests: those of the Risjord Plaintiffs, Firestone and Home. Accordingly, an analysis (such as that of the Government in contending that DR5-105 does not protect the opposing party) premised on situations in which only two private interests are involved is likely to be sterile. Viewed in terms of the three private interests here involved, it can readily be seen that Firestone (as well as the Risjord Plaintiffs) has an interest in the conflict posed by Risjord's role as counsel for the Risjord Plaintiffs; *i.e.*, Firestone and the Risjord Plaintiffs are both at risk.[6]

Nor does the mere fact that Firestone has not been a client of Risjord *per se* negate Firestone's interest or standing.

Apropos here is *Sapienza v. New York News, Inc.*, 481 F.Supp. 676 (S.D.N.Y. 1979), where an attorney representing plaintiffs and defendant A was successfully challenged by defendant B despite the consent of plaintiffs and A. In upholding the challenge, the court explained:

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[6]The Government's suggestion that Firestone be relegated to a suit against Home likewise will not bear analysis. The conflict of interests which Risjord confronts and the resulting need for his disqualification pose a question separate and apart from the question whether Home is accountable to Firestone for Home's conduct in the matter. And clearly the most appropriate place to determine the effectiveness of the consent approach which Firestone here challenges is the very proceeding in which those consents are ostensibly being relied on.

> ". . . The Code's exception to the general prohibitions against representing multiple clients with differing interests requires not only that the parties consent, but also that it be 'obvious' that the lawyer can adequately represent the interests of each client. [citing Disciplinary Rule 5-105(C) and case authority.]"

Noting the public interest considerations involved, the court observed:

> ". . . In addition to concern about adequate representation of the clients, concern about the 'confidence and respect of the community towards its bench and bar' supports disqualification of counsel in some cases, even where the parties have consented to the multiple representation. *Estate Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F.Supp. 93, 98-99 (S.D.N.Y. 1972). This case involves circumstances particularly likely to undermine such confidence and respect of the community." (481 F.Supp. at 680).

Nor do the cases cited by the Government suggest a contrary result.

In *United States v. Partin*, 601 F.2d 1000, 1006 (9th Cir. 1979), the question posed was whether criminal defendant A had standing to complain of prosecutorial misconduct against co-defendant B, the prosecutor having had contacts with B without consulting B's counsel. The complaining party (unlike Firestone here) had no direct personal interest at stake. And (again unlike the present case) there was no overriding public interest to be served. The same factors serve to distinguish *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (note 19) (1976) (A seeks to litigate tax liability of B) and *Warth v. Seldin*, 422 U.S. 490 (1975) (challenge to zoning practices).

In *Association of Data Processing Service Organizations, Inc. v. Camp.*, 397 U.S. 150, 157 (1970), cited by the

Government, the Court held that sellers of data processing services *did* have standing to challenge a ruling that national banks might provide such services. Standing likewise was found to exist in *Village of Arlington Heights v. Metropolitan Housing Devpt. Corp.*, 429 U.S. 252 (1977).

III.

THE GOVERNMENT'S POSITION ON THE MERITS IS NOT WELL TAKEN.

The Government's comments on the merits not only appear inapposite (in terms of any amicus interest of the Government) but are not well taken in any event.

1. In arguing for the viability of a consent approach, the Government fails to take proper account of the fact that there are three private interests involved here, of which at most two have "consented".[7]

Nor is the situation here analogous to that in *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978), cited by the Government. That case involved the propriety of government counsel representing certain air traffic controllers who were named as co-defendants with the United States. The appellate court found no conflict of interest precluding such multiple representation and then stated that even if there had been, under the facts it was obviated by the consent of the defendants. The gist of plaintiffs' challenge (rejected by the appellate court) was said to be that joint representation would make the defense more effective — a matter as to which the court felt plaintiffs could not legitimately complain. The court's broad language to the effect that DR5-105 is merely designed to protect "clients" and that the impact of multiple representation upon the opposing party is "irrelevant" was unnecessary

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[7]In addition, of course, there is the public interest to be considered.

to the decision and obviously does not really address the very different situation presented here.

2. The Government argues that Disciplinary Rule 5-105 is not necessarily a touchstone for disqualification.[8] The simplest answer to that argument is that (as the Government itself acknowledges at p. 24, note 20 of its Brief) the trial court itself looked to DR5-105 as a touchstone in ruling on the motion to disqualify and in fact purported to ground its "consent" approach on that very Rule. Beyond this, as noted in *Brennans, Inc. v. Brennans Restaurants, Inc.*, 590 F.2d 168, 172, note 5 (5th Cir. 1979) (a case cited by the Government in another context): "As the profession's own expression of its ethical standards, the Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules provide substantial guidance to federal courts in evaluating the conduct of attorneys appearing before them. [Citing cases]." Moreover, in the present context, the *principles* reflected in DR5-105 (principles which transcend that Rule and would exist independently of it) cannot be vindicated except in the context of disqualification.

3. The Government suggests that the trial court should be given discretion to determine what effect the conflict of which Firestone complains may affect Risjord's "vigor". While we do not believe that the impact of a conflict upon the vigor of counsel could be gauged even in a context where that measure were relevant, actually the gist of the challenge to Risjord does not turn on the mere degree of

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[8]The argument that such matters ought to be left solely to disciplinary proceedings has been rejected; instead, it has been recognized that the courts bear responsibility for supervision of the conduct of members of their Bars. See, *e.g., Hull v. Celanese Corp.* 513 F.2d 568, 571 (2d Cir. 1975).

his vigor, as the Government's argument tacitly assumes, but rather on whether any such "vigor" may be directed, consciously or unconsciously, to Home's ends.

Conclusion.

In addressing the question of appealability, the Government appears constrained by its own conflicting interests to resort to a somewhat tortured analysis which does not really point to a viable solution. In addressing the conflict of which Firestone complains, the Government, which is a relative latecomer to these proceedings, appears to misconceive the basic thrust of Firestone's position. Accordingly the Government Brief does not shed any meaningful light on the issues which the Court confronts in the present case.

Respectfully submitted,

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